NO. 42364-2-II
Thurston County Case No.: 10-2-012360

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION, ASSOCIATION OF NORTHWEST STEELHEADERS, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, and IDAHO RIVERS UNITED,

Petitioners-Appellants,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent-Appellee,

and

NORTHWEST RIVERPARTNERS,

Intervenor-Respondent-Appellee

RESPONSE BRIEF OF NORTHWEST RIVERPARTNERS

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I. INTRODUCTION

This appeal is the fifth "bite at the apple" in four years for Appellants Northwest Sportfishing Industry Association et al. (collectively "NSIA") in their effort to force the Department of Ecology ("Ecology") to weaken its water quality standards for the Columbia River. NSIA has now petitioned Ecology three times to initiate controversial and discretionary rulemaking to weaken or eliminate the 115% limit for total dissolved gas ("TDG") in the forebays[1] of the Columbia River dams. NSIA believes that raising the limit on TDG to potentially lethal levels is necessary to allow more water to spill over the dams,[2] a practice it contends will aid the downstream migration of certain Columbia/Snake River salmon protected under the Endangered Species Act ("ESA"). NSIA further contends that Ecology has a statutory duty to "maximize" the benefits to these species.

Ecology has previously three times denied NSIA's serial requests to weaken or eliminate the 115% forebay standard for TDG on the Columbia River. In so doing, and with each denial, Ecology carefully explained that (1) the state-wide standard necessary to protect all aquatic

[1] The forebay is the reservoir of water that is ultimately both upstream and above a hydroelectric power project or dam.

[2] "Spill" is water that passes over or through the dam without passing through the power generation turbines.

organisms from gas bubble disease ("GBD") and gas bubble trauma ("GBT") is 110%; (2) it had already granted an exception to the 110% standard to increase spill above that threshold to 115% in an effort to help downstream salmon migration; (3) increasing that exception beyond 115% creates additional risk of increased GBT and GBD in aquatic organisms (including salmon) near the surface; and (4) the benefit, if any, to downstream salmon migration is marginal. CP 29-30. These determinations were based on the results of a two-year comprehensive scientific review process with input from all stakeholders. Equally important, Ecology emphasized that its legal obligation is to set water quality standards for TDG that protect *all aquatic organisms* from harm, not to "maximize" benefits for salmon, and that Ecology has no "specific legal obligation to balance fish spill with the increased risks of gas bubble trauma" to aquatic organisms. CP 31. In short, Ecology declined to initiate rulemaking because further weakening water quality standards increases the risk of GBD and GBT to all aquatic organisms, while providing, at best, a small transport benefit to some juvenile salmon. CP 30.

Dissatisfied with Ecology's position, NSIA subsequently sought a fourth bite at the apple by petitioning Thurston County Superior Court to

force Ecology to weaken its water quality standards. Arguing that Ecology drew the wrong conclusions from the scientific literature it reviewed as part of its decision not to further weaken the 115% TDG standard, NSIA asked the court below to second-guess Ecology's technical conclusions, insisting that Ecology should have favored certain studies (supposedly favorable to NSIA's position) over other studies (clearly unfavorable to NSIA's position). Superior Court Judge Lisa Sutton did, in fact, carefully review all of the studies at issue, but appropriately refused to second-guess Ecology's expert judgment, explaining that "[w]here there is room for two opinions, and the agency acted honestly upon due consideration, the Court will not find that an action was arbitrary and capricious." CP 115. Moreover, Judge Sutton agreed that Ecology's obligation was to protect all aquatic organisms, and that Ecology has no legal obligation to "maximize salmon survival by balancing the benefits of spill with the risk of gas bubble trauma." CP 150-51.

NSIA now seeks a fifth bite at the apple, asking this Court – precisely as it repeatedly asked Ecology and then Judge Sutton – to review the scientific literature available in the record and reach a different conclusion as to how to set water quality standards for the Columbia River. Tellingly, NSIA does not explain why Judge Sutton's careful

review of the record below was wrong or identify *any* defect in Judge Sutton's 30-page oral decision or her nine-page findings of fact and conclusions of law. As such, this Court should reject NSIA's serial efforts for precisely the same reasons that led Judge Sutton to do so: because (1) Ecology has no legal duty to "maximize salmon survival by balancing the benefits of spill with the risk of gas bubble trauma" and (2) NSIA has failed to meet its burden to demonstrate that Ecology's denial of its petition was arbitrary and capricious.

Beyond Judge Sutton's persuasive reasoning, there are three principal reasons why this Court should affirm Judge Sutton's decision and reject NSIA's petition for rulemaking. *First*, as explained in section IV.B.1 below, the petition fails on its face under this Court's precedent because Ecology has no legal duty to "maximize salmon survival by balancing the benefits of spill with the risk of gas bubble trauma" and therefore Ecology's denial of the petition was not arbitrary and capricious as a matter of law. *Second*, as explained in section IV.B.2 below, even if Ecology had a duty to enact a rule maximizing salmon survival (and it does not), Ecology's denial of the petition was the product of reasoned decision-making and is supported by evidence in the record. Nothing more is required. *Third*, as explained in section IV.B.3 below, NSIA

arguments to the contrary do little more than nitpick or quibble with the underlying record and fundamentally fail to meet NSIA's burden of showing that Ecology's decision was arbitrary and capricious. For all these reasons, and those discussed below, NSIA's appeal should be dismissed.

II. ASSIGNMENT OF ERROR AND ISSUES ON APPEAL

NSIA does not specifically identify any errors with the legal or factual determinations made by Ecology in denying the petition or with the findings of fact and conclusions of law entered by Judge Sutton. *See* RAP 10.3(a)(4) (brief should contain a "separate concise statement of each error"). Accordingly, the legal and factual findings made by Ecology in denying the petition should be treated as verities on appeal. Moreover, NSIA's issue statements are predicated on characterizations of legal authority or facts that do not accurately reflect the decision of Ecology or the legal framework behind that decision. As such, Northwest RiverPartners submits the following alternative statement of issues:

1. Does Ecology have a statutory duty to set water quality standards for TDG on the Columbia River at levels that maximize spill at the hydroelectric dams or otherwise "maximize salmon survival by balancing the benefits of spill with the risk of gas bubble trauma"?

2. Assuming Ecology has such a mandatory legal duty, did Ecology's denial of the rulemaking petition arbitrarily or capriciously (a) fail to consider or improperly downplay relevant evidence or (b) favor experimental studies over field studies?[3]

III. STATEMENT OF THE CASE

A. The TDG Standard

Ecology's state-wide water quality standard for TDG is 110%. CP 149. The 110% TDG standard is designed to establish a margin of safety to protect all aquatic species. CP 20. Ecology has modified this state-wide standard to accommodate fish passage in the Columbia and Snake Rivers by allowing levels in the tailraces immediately below each dam (the stretch of the river that is directly and immediately impacted by the dam's spill) to reach 120%, while maintaining a more protective 115% limit for the remainder of the dam forebays to ensure that aquatic organisms are not subject to the dangerously high 120% level from dam to dam. CP 29.

Indeed, in reviewing and ultimately authorizing the Environmental Protection Agency ("EPA") to approve this geographically limited modification to the TDG water quality standard that otherwise applies

[3] NSIA also includes an issue related to attorneys' fees. NSIA is not entitled to attorneys' fees because, as explained below, all of its legal arguments lack merit and its appeal should be dismissed.

state-wide (CP 29), EPA and the National Marine Fisheries Service ("NMFS") determined that even the lower 115% tailrace exception "was likely to adversely affect salmonids." AR[4] 000046.2. Notwithstanding that finding, NSIA has repeatedly sought to substitute its scientific judgment for that of NMFS, EPA, and Ecology, and to ultimately eliminate this protective forebay threshold. CP 38 n.1.

B. Ecology Responded To The Request For Rule Changes By Convening A Multi-Stakeholder Adaptive Management Team.

As indicated above, NSIA submitted three separate rulemaking petitions. CP 38 n.1. NSIA submitted its first petition requesting that Ecology weaken its TDG standard in 2007. AR 001714.1. Ecology responded to that original petition by acknowledging the scientific complexity of the issues posed, and by convening a multi-stakeholder Adaptive Management Team ("AMT") to address these concerns.[5] AR 000072.1. The purpose of the AMT was to scientifically evaluate the consequences of weakening the TDG rule to allow increased spill at the federal dams on the Columbia River. AR 001917.1-69. The AMT held

[4] "AR" refers to the administrative record filed in this matter, the index of which is filed at CP 86-120. The format of citations to the administrative record is AR xxxxxx.y, with xxxxxx being the document number and y the page number.

[5] The AMT included representatives of Ecology, the Oregon Department of Environmental Quality ("DEQ"), NOAA Fisheries (also known as NMFS), the U.S. Army Corps of Engineers ("Corps"), the U.S. Fish and Wildlife Service, the EPA, and various tribal and other non-governmental entities.

monthly open meetings from November 2007 through September 2008, convened a number of expert scientific panels, and produced three separate robust literature reviews on (1) the effects of increased spill on TDG production, and (2) the biological effects of TDG on aquatic biota. AR 001917.19. The meetings were open to the public and provided full opportunity for groups like NSIA to present their positions related to the benefits and risks of spill. AR 001840.19.

Among other things, the AMT considered multiple analyses of the likely amount of increased spill and the attendant juvenile survival levels that would result from a relaxation of Washington's TDG standard. It also evaluated the very premise underlying this appeal: that the existing TDG standard is the primary factor limiting additional spill. AR 001917.21; AR 001754.7. During the AMT process, the federal agencies involved in the operation of the federal Columbia River dams acknowledged (and in fact emphasized) that, while at times helpful, spill is not a universal remedy to facilitate juvenile salmon migration. AR 001832.4; AR 001904.1. Instead, spill is one tool among many.

Equally important, it is a tool that can cause harmful consequences. For example, with more spill comes the possibility of "fallback" (when adult salmon that are returning to spawn miss a fish ladder due to the

turbulence of spill and fall back through spillways) resulting in a reduced survival rate. AR 001904.1; AR 000355.3 (spill can also obscure adult passage by blocking entrances to adult fishways). Moreover, spill is not always as effective as transportation (barging fish around the dams) in promoting fish survival.[6] Indeed, in low flow years, spill can be counterproductive. AR 001451.1 (spill yields negative effects on steelhead and spring/summer chinook relative to transport operations); AR 000161.35 (juvenile steelhead exposure to TDG levels between 113% and 117% led to 5-10% mortality); AR 000879.2 (federal agencies, including the Corps and Bonneville Power Administration, commented that eliminating forebay requirement decreases survival of steelhead).

The AMT process, and the collaborative work of the various state and federal agencies involved therein, culminated in a report containing a number of important findings related to spill, salmon management, and TDG effects. First, the AMT concluded that recent favorable salmon

[6] This fact has led several courts and multiple regional fish managers to "spread the risk" between the two options (spill and transportation) in order to maximize salmon survival yields. *See, e.g., Nw. Res. Info. Ctr. v. NMFS*, 56 F.3d 1060, 1064 (9th Cir. 1995) (describing the spread-the-risk approach); *Nat'l Wildlife Fed'n v. NMFS*, No. CV 01-640-RE, 2005 U.S. Dist. LEXIS 16352, at *15 (D. Or. June 10, 2005) (issuing preliminary injunction where agencies failed to properly spread the risk); AR 001832.4 (Independent Science Advisory Board ("ISAB") report explaining: "Given the magnitude of uncertainty imposed by the nature and extent of available information, the ISAB continues to see merit in a strategy of 'spreading the risk' to balance the possible risks against the perceived benefits."); *see also* AR 000032.12 (impossible to know direct and indirect effects of spill on juvenile survival).

returns have resulted from a combination of passage improvement projects, favorable ocean conditions, and increased spill measures – not from increased spill alone. AR 001754.7. Second, and equally significant, the AMT found that Ecology's current TDG rules are not determinative of the amount of spill achieved in a given year because hydropower operational limitations, not gas caps, are the primary limiting factors for spill. AR 001754.7.

Third, the AMT confirmed that much remains to be known about TDG production and its biological consequences. Indeed, while the best available science on TDG lethality is robust, the literature on TDG's potential to cause sub-lethal chronic effects is lacking. AR 000035.1 (not a lot is known about behavioral effects); AR 001906.1 ("the key uncertainties . . . relate to chronic, sublethal toxicity effects to fish and other aquatic species"). The record is replete with evidence that TDG can be a serious threat to the health of aquatic life because it can result in GBT – a condition that can cause internal or external gas bubbles that can be fatal to fish or result in other sub-lethal chronic effects impeding survival. AR 000388.4; AR 000161.14 (GBT found at TDG levels of 115% and higher, manifested in blistering skin, bubbles in cardio-vascular system, and secondary bacterial infections in frogs); AR 000161.56-57

(fish can die or show internal chemical changes without showing signs of GBT; susceptibility to GBT increases with stress and disease); AR 000891 (Ecology evaluation of one of the literature reviews emphasizing that not much is known about non-lethal effects of TDG like burst swim bladders, gas bubble blockage in arteries, and behavioral changes, which, when combined, show that levels of TDG up to 120% can cause negative effects on fish).

Fourth, the AMT concluded that the magnitude of the risk of GBT varies from species to species. TDG accumulates at shallow depths, and while some species can dive to protect themselves to a certain degree from high levels of dissolved gases, many others cannot.[7] AR 000032.8; AR 000355.2; AR 000887.1 (TDG concern exists when organisms, including salmon, use the top two meters of the water column); AR 000161.14-15 (50% of white sturgeon larvae exposed to TDG at 115% experienced GBT). As a result, those species that cannot reach lower depths suffer

[7] While salmon can sometimes dive to depths to avoid the most harmful forms of TDG at certain levels, accumulating levels of TDG can still cause death or sub-lethal effects to salmon, especially when deeper water is not available to migrating salmon. *See generally* AR 001917.1-69; AR 001754.7 (Ecology's denial of third petition, emphasizing that salmon do, in fact, spend time at depths where significant detrimental effects of TDG were found). Indeed, the data reviewed by the AMT revealed that TDG can be especially harmful to migrating juvenile salmonids that are delayed in the forebays at elevated levels. *See, e.g.*, AR 000032.3-4 (state, federal, and tribal fishery agencies' joint technical staff memo citing NOAA Fisheries' concern that increased TDG levels result in increased trend in incidence and severity of GBT in salmon).

from increased TDG exposure. This variability in exposure creates additional uncertainty because TDG can be difficult to measure, especially when temperature or other environmental and anthropogenic factors combine to produce cumulative and synergistic effects. AR 000032.3; AR 000161.10 (increase in predator rates at TDG exposures of 115% and above); AR 000355.2 (NMFS's biologists found GBT at TDG levels of 110%, reinforcing the fact that existing data is not sufficient to fully evaluate the sub-lethal and cumulative effects of TDG on salmonids incubating and rearing in shallow areas, which may be exposed to TDG for long periods of time).

The AMT process culminated in a Final Report ("Report") published jointly by Ecology and DEQ in January 2009. While the two states reached different outcomes regarding whether to weaken their respective TDG water quality standards, the agencies agreed on and endorsed the Report's scientific and technical findings. AR 001917.10. Those findings concluded that the total amount of additional water that could be spilled over the Columbia River's dams due to the removal of the 115% forebay requirement would be between 1% and 2%. AR 001917.9. While the Report concluded that "there is no way to know the exact impacts on fish survival due to the increase in spill," it found it likely that

a "small, positive effect on chinook survival would result between zero and 1%." AR 001917.10. The Report further concluded that the corollary to this small increase in fish survival was an attendant increase in TDG production at an expected rate of 0.3% to 4% in the forebays, and 0.1% in the tailraces. AR 001917.10.

In view of these findings, Ecology concluded in the AMT Report that it would not revise its 115% TDG forebay water quality criterion for the Columbia River:

> Ecology determined that there would be a potential for a small benefit to salmon related to fish spill if the 115% forebay criterion was eliminated, but there would also be the potential for a small increase in harm from increased gas bubble trauma. The weight of all the evidence from available scientific studies clearly points to detrimental effects on aquatic life near the surface when TDG approaches 120%. Based on the information in [the AMT Report], Ecology does not believe the overall benefits of additional spill versus additional risk of gas bubble trauma are clear and are sufficient for a rule revision.

AR 001917.62. In other words, Ecology found that, in light of the increased risk of injury to aquatic species, the small potential benefit to migrating salmon that would result from the proposed 120% TDG relaxation was insufficient to warrant weakening the State's existing rule.

C. Petitioners' Serial Rulemaking Petitions

The outcome of the robust AMT process did not deter NSIA. Instead, Ecology's decision not to amend its TDG standard incited

Petitioners to re-file their petition in June 2009. AR 001914.1. The second petition, like the first, sought either to raise the 115% TDG forebay limit to 120%, or to eliminate monitoring in the forebay altogether. AR 001914.2. Given the similarities of the two petitions, Ecology denied the second petition in August 2009, relying in large part on its prior AMT evaluation process, which concluded that increasing the TDG limits created too great a risk to juvenile salmon and other aquatic organisms, with little attendant benefit. AR 001914.2.

Rather than appeal Ecology's second petition denial, Petitioners filed yet a third rulemaking request on March 8, 2010. The third petition sought relief identical to that sought in the second petition by tediously regurgitating each of the arguments from the prior petitions. AR 001453.1. The third petition maintained that Ecology's second petition denial was flawed because the agency (1) failed to consider Petitioners' preferred studies; (2) misrepresented other studies; (3) inappropriately favored lab studies over field studies; and (4) failed to properly consider the benefits of spill. AR 001453.1.

Ecology denied the third request for rulemaking on May 7, 2010, with a detailed letter explaining its rationale, including the results of the AMT process and Ecology's conclusions from the two prior petition

denials. CP 29-36. Among other things, Ecology explained that it "is not under any specific legal obligation to balance fish spill with the increased risk of gas bubble trauma," and that therefore NSIA was wrong in arguing that Ecology was required to "'maximize' salmon survival" in setting water quality standards. CP 31. On the contrary, Ecology's obligation is to maintain and protect water quality for "all indigenous biota." CP 30.

Ecology also responded directly to allegations that it "overstated the potential harms to aquatic biota by omitting and misrepresenting studies in the literature review." CP 32. As to that issue, Ecology "reviewed the studies" that were allegedly "overstated" or "misrepresented" and confirmed that it had properly reviewed those studies. Moreover, Ecology explained: (1) it was required to consider other studies (not mentioned by NSIA) showing lethal and sub-lethal effects of TDG on aquatic organisms, and (2) notwithstanding NSIA's assertions to the contrary, experimental (laboratory) studies are not only valid but routinely used by EPA and other states. CP 32-33.

In its denial of the third petition, Ecology also rejected a number of erroneous factual and legal assertions. For example, it rejected NSIA's argument that "salmon habitat" is the most sensitive designated use of the Columbia River, explaining that "Ecology is not convinced that salmon

are the most sensitive aquatic life in terms of TDG." CP 34. Ecology similarly rejected NSIA's arguments that it was illegally protecting power users, explaining that "power generation is not a designated use," and rejected NSIA's arguments that the 115% TDG rule plays "a dominant role" in reducing spill for salmon survival, explaining instead that "planned operations" – not TDG limits – were the primary limiting factor. CP 35. In addition, Ecology flatly rejected NSIA's arguments that "there is no risk to aquatic life near the surface when TDG approaches 120%," explaining that the "literature review found sublethal and lethal effects on aquatic life (not just salmon) at 120%." CP 36. For all these reasons, Ecology rejected NSIA's request to initiate rulemaking.

D. The Superior Court Challenge

NSIA responded to Ecology's denial of the third petition for rulemaking by filing a petition for judicial review in Superior Court on June 3, 2010, asserting three causes of action. CP 3. First, NSIA argued that Ecology's denial of the third petition was arbitrary and capricious because Ecology failed to consider or adequately address relevant scientific literature or information. CP 4-5. Second, NSIA argued that Ecology violated mandatory legal duties to (a) "set a TDG water quality standard at levels that supports aquatic life, the most sensitive designated

use of the Snake and Columbia Rivers" and (b) rely only on credible data in determining whether water quality standards are being met. CP 5. Third, NSIA sought judicial review of Ecology's existing TDG rule, arguing that the existing rule fails both to protect salmonids and other aquatic organisms, and to rely on sound science or credible data. CP 5.

NSIA subsequently dropped its second and third causes of action. CP 149. Accordingly, the only issue before the Superior Court was whether Ecology arbitrarily and capriciously denied the request for rulemaking. The Court heard oral argument on the one remaining issue on May 13, 2011. CP 149. On May 20, 2011, the Court issued a detailed oral ruling, rejecting every issue raised by NSIA and finding that Ecology did not act in an arbitrary and capricious manner. CP 157-89. On June 14, the Court entered a written order denying the petition, including detailed findings of fact and conclusions of law. CP 148-56. In so doing, the Court rejected NSIA's arguments insisting that (1) Ecology was obligated to set water quality standards for TDG at levels that "maximize" the benefits for salmon (CP 150-51); (2) the 115% standard was not grounded in science, overlooked studies, or improperly relied on experimental studies (CP 151-52); and (3) salmon habitat is the most sensitive designated use. CP 152-53.

IV. ARGUMENT

A. The Standard Of Review In This Case Is Highly Deferential To Ecology.

The "arbitrary and capricious" standard governs this Court's review of an agency's denial of a petition for rulemaking. *Alpine Lakes Prot. Soc'y v. Dep't of Ecology*, 135 Wn. App. 376, 392, 144 P.3d 385 (2006). This standard of review is deferential in nature, asking "not whether the result was itself reasonable in the judgment of the court" but whether "the result was reached through a process of reason." *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (internal quotation marks, citation, and emphasis omitted). In that regard, "[w]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious, even though a reviewing court may believe it to be erroneous." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). This deference is even more critical where the decision at issue is based heavily on "factual matters which are complex, technical, and close to the heart of the agency's expertise." *Rios,* 145 Wn.2d at 501 n.12 (internal quotation marks and citation omitted); *see also Dep't of Ecology v. PUD No. 1 of Jefferson Cnty.*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993) ("[I]t is well settled that due deference must be given to the specialized knowledge and expertise of

an administrative agency."), *aff'd*, 511 U.S. 700 (1994); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594-95, 90 P.3d 659 (2004) (applying substantial deference to Ecology's water quality decisions).

This heightened deferential standard is particularly appropriate when reviewing an agency's denial of a petition for discretionary rulemaking. Unlike a rulemaking decision that may take years to complete, a petition denial must be completed within 60 days. RCW 34.05.330(1). Given the short time frame involved, the State's Administrative Procedure Act ("APA") requires only that the denial be "in writing" and that it address the concerns raised in the petition. *Id.* Moreover, petition denials invariably involve "special problems of priority setting and resource allocation," in which courts are reluctant to tread. *Hillis,* 131 Wn.2d at 393-94 (internal quotation marks and citation omitted). For this reason too, Washington courts require the petitioner to demonstrate "extraordinary" circumstances before overturning an agency refusal to initiate rulemaking. *Rios*, 145 Wn.2d at 507. Federal courts similarly employ an "'extremely limited' and 'highly deferential'" standard of judicial review of agency decisions not to engage in discretionary rulemaking. *Massachusetts v. EPA*, 549 U.S. 497, 527-28,

127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (*quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

B. Ecology's Denial Of NSIA's Rulemaking Petition Is Well Reasoned And Entitled To Deference.

As explained in detail below, there are three main reasons why this Court should affirm the Superior Court's decision. *First*, this Court's precedent demonstrates that an agency does not act arbitrarily or capriciously in denying a rulemaking petition when, as here, the agency has no legal duty to enact the requested rule. NSIA's petition asks Ecology to set water quality standards for TDG at levels that would "maximize" benefits to salmon. But Ecology has no legal duty to enact such a rule, and accordingly NSIA's claims fail as a matter of law.

Second, even assuming that Ecology had a legal duty to "maximize" the benefits to salmon (and it does not), it is equally apparent that Ecology's denial of NSIA's petition was the product of reasoned decision-making, and is therefore entitled to deference by this Court. As detailed above in the statement of the case, Ecology carefully reviewed all of the data available, and explained the reasons for its denial in a detailed letter. The APA requires nothing more.

Third, NSIA's anemic arguments to the contrary lack merit. NSIA's arguments strain to make Ecology look arbitrary by claiming that it overlooked, misunderstood, or mischaracterized certain studies. But the record here demonstrates the opposite, showing that Ecology carefully considered all the studies at issue and reasonably determined that there was a non-negligible risk of harm to aquatic organisms. NSIA's arguments, at bottom, are nothing more than an effort to second-guess Ecology's expert scientific determination. This is something that courts are simply ill-equipped to do, and accordingly such claims fail to show that Ecology acted in an arbitrary and capricious manner.

Finally, even if NSIA's claims had merit (and they do not), NSIA overreaches in asking this Court to order Ecology to initiate rulemaking. If Ecology did overlook or misunderstand some study in the record (and it did not), at most the Court should remand the issue to Ecology to consider the impact of that study on its decision.

1. Ecology Does Not Have A Statutory Duty To Maximize Benefits To Salmon.

This Court should deny NSIA's petition because Ecology has no legal duty to enact NSIA's requested rule change. Washington's APA at RCW 34.05.570(4) provides for judicial review of certain "other" agency actions, including an agency's failure to act. With respect to a failure to

act, the APA imposes two important judicial prerequisites. First, judicial review is authorized *only* for an agency's "failure to perform a duty that is required by law to be performed." RCW 34.05.570(4)(b). Second, when the alleged failure to act relates to a refusal to promulgate required rule changes, the party seeking judicial review must first exhaust administrative remedies by petitioning the agency for a rule change. *See Nw. Ecosystem Alliance v. Forest Practices Bd.*, 149 Wn.2d 67, 75, 66 P.3d 614 (2003). As explained below, NSIA's petition fails to meet the first requirement because Ecology has no legal obligation to "maximize salmon survival by balancing the benefits of spill with the risk of gas bubble trauma." CP 31.

The controlling case on this point is this Court's decision in *Alpine Lakes*, 135 Wn. App. 376. In that case, a conservation organization ("ALPS") petitioned the Forest Practices Board (the "Board") to promulgate a "catchall" provision in its forest practices regulations that would subject certain classes of projects to additional environmental review. *Id.* at 381. The Board denied the petition, explaining that "the Board has no statutory or other legal 'duty' to engage in rule making to adopt a rule similar to or that operates like the [catchall rule] described in

the petition." *Id.* at 389 (internal quotation marks and citation omitted). ALPS sought judicial review of the denial.

On appeal, this Court affirmed the Board's decision to reject the petition for rulemaking, agreeing that "no rule or statute requires" the Board to adopt the rule proposed by ALPS. *Id.* at 397-98. The Court further explained that the "Board may, *if it chooses*, adopt" such a rule, but it simply has no obligation to do so. *Id.* at 398. The Court further concluded that because the Board "had no duty" to promulgate the rule at issue, the Board therefore "did not act arbitrarily and capriciously" in denying the petition for rulemaking. *Id.* at 399.

The decision in *Alpine Lakes* is directly controlling here. NSIA's third petition, just like ALPS's petition, argued that the agency was under a statutory duty to act, in this case "to set TDG limits that maximize salmon survival by balancing the benefits of spill with the risk of GBT." CP 31. Ecology responded, just like the Board in *Alpine Lakes*, that it "is not under any legal obligation" to enact the requested rule. CP 31. Instead, Ecology explained that its statutory obligation is to protect *all* indigenous fish and non-fish aquatic species from the harmful effects of TDG, and to ensure an "adequate margin of safety" for all organisms. CP 31. Although, no doubt, Ecology may, "*if it chooses,*" provide an

exception to state water quality standards *if* it can maintain an adequate margin of safety for other organisms (as it did in setting the existing 115% exception), it is under no specific legal obligation to do so. Accordingly, under the controlling precedent established by *Alpine Lakes*, Ecology's denial of the petition was not arbitrary and capricious, and NSIA's petition to this Court should be denied for this reason alone.

Tellingly, NSIA does not identify any statutory authority requiring Ecology to weaken water quality standards in order to "maximize" benefits to salmon, or to balance the benefits of increasing spill at the federal dams with the risk of harm to other organisms. Nor could it, because NSIA withdrew these arguments in the Superior Court. CP 23-24 (explaining second cause of action alleges 115% TDG standard violates Ecology's mandatory duty to protect salmon); CP 149 (withdrawing second cause of action). Under *Alpine Lakes* and RCW 34.05.570(4)(b), NSIA's withdrawal of this claim below is fatal to any argument that Ecology has a duty to promulgate the requested rule change.

Instead of identifying any statutory duty to "maximize" benefits to salmon, NSIA identifies Ecology's general obligations under State and federal law to "protect" the most sensitive uses of State waters, and notes that salmon migration is listed as a "key" aquatic use. NSIA Br. at 21.

Yet, that *general* obligation to "protect" designated uses does not establish a *particular* statutory duty to "maximize" benefits for salmon, for three reasons.

First, NSIA overlooks the plain language of Ecology's regulations, which require "that all indigenous fish and nonfish aquatic species be protected in waters of the state in addition to the key species described below." WAC 173-201A-200(1); *see also* AR 001917.16 ("The Clean Water Act does not suggest trade-offs of fish passage for TDG"). Thus, far from requiring Ecology to "maximize" benefits to key individual species, the regulations expressly require protection of all aquatic species. *Second*, Ecology found (and Judge Sutton affirmed) that salmon are *not* "the most sensitive aquatic life in terms of effects from high TDG." CP 34, 152-53. NSIA has not identified any error in Ecology's (or Judge Sutton's) findings on this point, and it is therefore a verity on appeal that salmon are not the most sensitive aquatic species with respect to TDG. *Third*, Ecology's duty to "protect" all aquatic organisms is completely satisfied by existing water quality standards setting the TDG limit at 115%. Critically, the adequacy of the 115% standard to "protect" all aquatic organisms *is not in dispute in this case* because NSIA withdrew its challenge to the adequacy of the existing 115% standard in the Superior

Court. CP 149 (withdrawing third cause of action). Thus, there is no dispute that the existing 115% standard adequately protects all aquatic uses. Rather, this appeal turns on whether Ecology should be required to weaken water quality standards and increase the risk to aquatic organisms in order to "maximize" the supposed benefits to salmon. This is something Ecology has no legal obligation to do.

For these reasons, the Washington Supreme Court's decision in *Rios*, 145 Wn.2d 483, is also instructive in this case. Unlike *Alpine Lakes* and the present case, *Rios* involved a petition to initiate *mandatory* rulemaking. In *Rios*, the Court reviewed whether the Department of Labor and Industries (the "Department") properly denied a petition for rulemaking under the Washington Industrial Safety and Health Act of 1973 ("WISHA"). After reviewing the statute, the Court concluded that WISHA placed a *mandatory duty* on the Department to promulgate worker safety standards "to the extent the standard is capable of being economically and technologically accomplished." *Rios*, 145 Wn.2d at 498-99 (internal quotation marks and citation omitted).

The *Rios* Court then reviewed the record underlying the petition denial to determine whether (1) the proposed safety standard was "economically and technologically" feasible (and therefore required); and

(2) if so, whether the decision to forgo mandatory rulemaking was arbitrary and capricious in light of the Department's conflicting obligations and resource limitations. *Id.* at 505-08. As to the first point, the Court concluded the statutory obligation was triggered because the Department's own report explained that the proposed standard was "the most well developed and feasible method." *Id.* at 506 (internal quotation marks and citation omitted). As to the second point, the Court found the Department's financial justification for not promulgating the mandatory rule insufficient, given the amount of time already invested in reviewing the standard and the minimal effort required to finalize such a rule. *Id.* at 507-08. Under these "extraordinary circumstances," the Court reversed the Department's decision.

Here, by contrast, Ecology has no mandatory legal duty to maximize benefits to salmon. Its only duty is to "protect" all aquatic organisms, including the most sensitive species (which do not include salmon), from the negative effects of TDG. Unlike in *Rios*, NSIA has produced no evidence that Ecology's current water quality standards do not satisfy its duty to "protect," such that a mandatory rulemaking obligation is triggered, and instead NSIA withdrew that very issue before the Superior Court. CP 149.

In short, this Court should follow its decision in *Alpine Lakes* and dismiss the petition, "because [Ecology] had no duty to promulgate" NSIA's proposed rule, and therefore Ecology "did not act arbitrarily and capriciously in denying [NSIA's] petition for rule making." *Alpine Lakes*, 135 Wn. App. at 399.

2. Ecology's Denial Was Reasoned And Well Within Its Discretion.

Even assuming that NSIA satisfied the requirements in *Alpine Lakes* and *Rios* to identify a mandatory duty to promulgate the rule changes requested by NSIA (and it has not), it is equally clear that Ecology's decision to forgo the requested rule change is not arbitrary and capricious. As explained in detail above in the statement of the case, Ecology carefully responded to each one of NSIA's concerns. As part of a two-year comprehensive scientific review process, Ecology determined that raising the 115% standard to 120% could result in "a potential for a small benefit to salmon related to fish spill." CP 30. But it also identified "the potential for a small increase in harm from increased gas bubble trauma," in addition to clear evidence of "detrimental effects on aquatic life near the surface when TDG approaches 120%." CP 30. Based on this record, Ecology could not (and did not) find that the "overall benefits of additional spill versus detrimental effects to other aquatic life are clear or

sufficient for a rule revision." CP 30. Thus, Ecology's decision in denying the petition was clearly "reached through a process of reason" and is entitled to deference by this Court. *Rios*, 145 Wn.2d at 501 (internal quotation marks and citation omitted).

Not only are Ecology's actions reasonable in this regard, but they are entirely consistent with its statutory obligations. Ecology's mandate is to set water quality standards with a "margin of safety." 33 U.S.C. § 1313(d)(1)(C), (D). In this case, Ecology had an obligation to set a total maximum daily load for TDG on the lower Snake and Columbia Rivers because it found that there are "multiple reaches" on these rivers that currently *exceed* the existing TDG standards. AR 001917.14; CP 34 n.13 (petition denial referencing applicable TDG total maximum daily loads). Ecology explicitly recognized this need for a margin of safety in denying NSIA's third petition. AR 001754.1 ("Ecology maintains that the 115% forebay criteria adjustment allows increased spill for fish while also providing a margin of safety for other organisms shown to be harmed by prolonged exposure to TDG levels above 115% of saturation."). In short, Ecology's decision was both reached through a process of reason and consistent with its statutory authority.

This reasoned and thoughtful explanation for forgoing rulemaking is a far cry from the "limited resources" justification found insufficient in *Rios*. 145 Wn.2d at 506. The Court in *Rios* rejected the agency's reliance "primarily" on financial reasons, explaining that "an agency's allusion to fiscal considerations and prioritizing cannot be regarded as an unbeatable trump in the agency's hand." *Id.* at 507. Here, by contrast, Ecology did not rely on "primarily" financial justifications in denying the third petition. Far from it. Instead, Ecology made a policy decision that a rule revision was not warranted based on the underlying record evidence demonstrating that such a rule change would have a "potential" small benefit to salmon while carrying a concomitant "potential" small increased risk to other aquatic organisms. CP 30. This is the kind of reasoned policy decision that courts routinely find sufficient for denying a petition for rulemaking.

Indeed, the District of Columbia Circuit's decision in *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008), demonstrates that deference is particularly appropriate with respect to such policy decisions. In *Defenders of Wildlife*, the petitioners requested emergency rulemaking to protect right whales from ship strikes along the Atlantic coast. NMFS denied the petition in a brief two-page notice. *See* 70 Fed. Reg. 56,884

(Sept. 29, 2005). NMFS conceded that "the loss of even a single individual may contribute to the extinction of the species," and that four fatal ship strikes had occurred the year prior. 532 F.3d at 916, 920 (internal quotation marks and citation omitted). Notwithstanding these concessions, the court affirmed NMFS's denial, explaining that "it is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." *Id.* at 921 (internal quotation marks, citation, and brackets omitted). The court found that NMFS's brief denial letter "represented reasoned decisionmaking," "[was] based on facts found in the record," and presented no "abnormal circumstances." *Id.* Accordingly, the court affirmed the decision, concluding that the agency "made a policy decision" warranting deference. *Id.*

This Court should reach the same result in this case. In issuing its denial of NSIA's third petition, Ecology went far beyond the brief explanation required by *Defenders of Wildlife* and RCW 34.05.330(1)(a)(i). Instead of a two-page denial, Ecology provided a detailed letter explaining its decision and premising its rejection of Petitioners' request on the two-year robust review by the AMT. CP 30-36. Ecology reviewed large volumes of scientific and statistical data involving

water quality impacts. Its decision addressed the studies identified by Petitioners and recognized that increased spill has the potential to provide some small benefit to salmon. Nonetheless, in its expert determination, Ecology found this small potential benefit insufficient to warrant further increases in TDG, given the potential for increased biological harm. AR 001917.62-63. Ecology's judgment is reasoned, explained, and supported by the record. Nothing more is required.

In fact, this case presents a situation far less compelling than that presented in *Defenders of Wildlife*, where the record showed that the agency's failure to undertake immediate rulemaking could potentially result in the extinction of the right whale. Here, the record shows, at best, that some species could experience a 1% survival benefit, whereas other species might actually be worse off. Simply put, if the potential extinction of the right whale in *Defenders of Wildlife* was not sufficient to present "the rarest and most compelling of circumstances" warranting reversal of an agency's decision not to initiate rulemaking, the speculative and marginal spill benefits argued here surely do not meet this stringent standard. NSIA's petition should be denied on this basis.

In sum, Ecology's denial of NSIA's petition was the product of reasoned decision-making and was consistent with its statutory authority. It is therefore entitled to deference by this Court.

3. NSIA's Arguments To The Contrary Lack Merit.

NSIA's arguments fail to meet its burden of demonstrating that Ecology's denial was arbitrary and capricious. NSIA has two main arguments: (1) Ecology overlooked or misapprehended certain studies; and (2) Ecology improperly considered the results of laboratory experiments showing harm from TDG approaching 120%. These arguments find no support in the administrative record or the applicable legal standards.

a. Ecology Did Not Overlook Or Misapprehend Studies.

NSIA first strains to make Ecology's denial of the rulemaking petition seem unreasonable by claiming that Ecology arbitrarily and capriciously overlooked (or misunderstood) key studies in the record. Indeed, NSIA goes so far as to insist that Ecology never considered relevant studies (such as "Ryan et al."), maintaining that "there is no evidence in the petition denial or the record that agency considered or addressed numerous relevant field studies." NSIA Br. at 26, 32. NSIA

then invites the Court to accept its weighting of the scientific evidence, insisting the evidence is "overwhelming and one-sided." NSIA Br. at 21.

These arguments defy credulity. In its petition denial, Ecology explained that it "reviewed the studies that were identified in the petition," which included Ryan et al. in addition to the other studies allegedly overlooked by Ecology. CP 32. These studies were also evaluated in three separate literature reviews conducted by Ecology, NMFS, and Parametrix, and thoroughly discussed by all stakeholders (including Ecology) as part of the two-year AMT process. CP 29-30 (relying on "the results of a thorough review conducted in 2007-2009" and the information in the AMT Report). Thus, NSIA is simply wrong when it claims that Ecology "overlooked" these studies.[8]

NSIA, however, wants to have it both ways by then insisting that Ecology misunderstood the very same studies it supposedly overlooked, in only paraphrasing or "cataloguing" certain studies, and in failing to highlight certain elements of those studies that Petitioners deemed important to their position. NSIA Br. at 26-32. Similarly, Petitioners nitpick and quibble with the word selection expressed in Ecology's

[8] Judge Sutton reviewed these studies as well. CP 179 ("The court went back and looked at the literature and the studies that were cited in the materials, both in the briefing and in the administrative record.").

literature review. *See, e.g.*, NSIA Br. at 27 (acknowledging that "while the summary *is* accurate as far as it goes," "it fails to disclose any of the study's most relevant findings" (emphasis added)). NSIA alternatively argues that Ecology's denial failed to cite NSIA's preferred suite of studies and instead highlighted studies that Petitioners believe are less scientifically worthy. NSIA Br. at 26-32.

These anemic arguments lack legal merit. As explained previously, Ecology was under no requirement to provide a scientific treatise as to its reasoning. Instead, Ecology was only required to provide a brief written explanation within a very short 60-day time frame. RCW 34.05.330(1)(a) (requiring decision to be issued within 60 days of filing of petition and requiring Ecology to state reasons for its denial and to address the issues raised by the petition); *see also* 5 U.S.C. § 555(e) (denial of rulemaking petition must provide brief rationale). As explained above, Ecology more than met the modest obligation imposed on it when denying the most recent petition for rulemaking. Ecology explicitly incorporated the exhaustive multi-year AMT process and its renewed deliberations in 2009 and 2010 in its denial letter. Indeed, as a result of Petitioners' subsequent petitions, Ecology reconsidered the policy decision it originally reached through the multi-state regional AMT process and

concluded again, on two separate occasions, that the decision was appropriate. AR 001754.1. This far exceeds what is required, and the complaints raised in this lawsuit are a far cry from the types of abject failures required to overturn Ecology's petition denial. *See Defenders of Wildlife*, 532 F.3d at 919 (rulemaking petition denials can only be overturned in "the rarest and most compelling of circumstances" (internal quotation marks and citation omitted)).

In short, Ecology did not "overlook" studies as NSIA claims. On the contrary, Ecology carefully and repeatedly reviewed and considered the results of all the studies identified by NSIA.

b. Ecology Reasonably Relied On Experimental Studies.

For much the same reason, NSIA's arguments that Ecology "irrationally" favored laboratory (or experimental) studies over field studies, or otherwise "relied exclusively" on laboratory studies are also unavailing. NSIA Br. at 33. As explained above, Ecology reviewed all "the studies that were identified in the petition," both field and experimental studies. CP 32. Ecology agreed that some of the field studies showed "a potential for a small benefit to salmon." CP 30. Yet, other studies, including those that were experimental in nature, showed

"the potential for a small increase in harm." CP 30. Ecology further emphasized that while

> minimal effects are seen in many invertebrates . . . other studies cited in Ecology's literature review show harmful affects to other indigenous species. Federal and state laws do not allow Ecology to disregard the aquatic life use requirements of some species over another. Ecology must consider effects on aquatic organisms other than salmonids that, in this case, utilize the upper water column for all or portions of their life stages.

CP 33. Thus, it is simply not accurate to state that Ecology "relied exclusively" on laboratory studies.

NSIA effectively insists that Ecology should *ignore* the results of these experimental studies – which clearly show harm to aquatic organisms as TDG approaches 120%. But Ecology can no more ignore experimental studies than it can ignore NSIA's preferred field studies. Indeed, as the key case cited by NSIA explains, an agency cannot "ignore the considerable information that it does have." *Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 950, 239 P.3d 1140 (2010). Here, Ecology "does have" information from experiments showing potential harm to aquatic organisms as TDG approaches 120%, and therefore it cannot "ignore the information."

Nor is there anything untoward about relying on experimental studies. As Ecology previously explained in its petition denial, "[d]ata

and information from experimental studies are routinely used by EPA and the state to develop water quality standards." CP 33. Accordingly, Ecology was required to (and did) consider experimental studies "that show harmful effects to aquatic life due to TDG approaching 120%." CP 33. Indeed, it would have been arbitrary and capricious to do otherwise. *Puget Sound Harvesters Ass'n,* 157 Wn. App. at 950.[9]

NSIA also suggests that the results of these experimental studies were rendered irrelevant because some of the experiments were performed on bullfrogs in California, an "invasive" species. NSIA Br. at 33-34. It should go without saying that lethal laboratory experiments are not routinely performed on endangered Columbia River salmon. Rather, invasive species such as rats are commonly used to test the ability of certain species to resist toxic environments. *See, e.g.*, WAC 173-303-100(5)(b)(i) (testing for dangerous waste designation based on impact to fish, rats, and rabbits). The fact that TDG levels approaching 120% negatively impact bullfrogs is clearly relevant to the potential impacts to

[9] Similarly, NSIA is wrong when it states that "Ecology insisted that it must elevate any perceived risk to 'other aquatic life' over the needs of threatened or endangered salmon." NSIA Br. at 22. But NSIA cites no place where Ecology ever "insisted" on elevating the needs of one species over another. Quite the opposite, Ecology refused NSIA's invitation to maximize the benefits to salmon and thereby elevate the needs of one species over another, in favor of its clear statutory obligation to protect all aquatic organisms. CP 31.

other aquatic organisms, especially when, as here, NSIA concedes that the bullfrog "is not as sensitive" to TDG as other organisms in the river. NSIA Br. at 34. Moreover, as explained above, both the EPA and other states commonly use such experimental data. CP 33. Ecology was in no way arbitrary or capricious to have considered such studies and to have subsequently concluded that there is "the potential for a small increase in harm from increased gas bubble trauma." CP 30.

In any event, NSIA effectively concedes that laboratory studies on steelhead and sturgeon do in fact show "adverse" effects on these organisms as TDG approaches 120%. NSIA Br. at 34 nn.21-22. Given that concession, NSIA's argument boils down to an assertion that Ecology should have drawn different conclusions from the data because NSIA believes that the risk of that harm is too small. But State and federal laws vest Ecology, not NSIA or the courts, with the obligation to make this kind of technical evaluation and policy decision. Put differently, the fact that Petitioners can cite to studies that emphasize something different than the ones relied on by Ecology is of little consequence given the applicable standard of review, which requires the Court to defer to Ecology's view of the science, even if the Court disagrees with that view. *Hillis*, 131 Wn.2d

at 383 (when there is room for two opinions, the action taken is not arbitrary or capricious even if the Court believes it to be erroneous).

Indeed, in Washington, courts are cautioned not to exercise "the discretion that the legislature has placed in the agency." *Hillis,* 131 Wn.2d at 395. Ecology is vested with the authority and discretion to promulgate and revise water quality standards, and is entrusted to make the necessary scientific determinations and policy choices. Ecology's decision not to change those standards should not be second-guessed, where, as here, its denial involved the exercise of its specialized scientific and technical expertise. Accordingly, NSIA has failed to meet its burden of demonstrating that Ecology's denial was arbitrary and capricious.

c. DEQ's Decision To Modify Its Existing Waiver Is Legally Immaterial.

In addition to all of the arguments identified above, NSIA also maintained in the Superior Court that the Oregon DEQ somehow got it "correct" in removing the 115% forebay requirement, implying that Ecology's decision was therefore in error. CP 51. NSIA does not make this argument on appeal, and it is therefore waived.

If, however, this Court decides to address this issue, it should reject NSIA's argument because DEQ's decision is legally irrelevant and factually inapposite for a number of important reasons. First,

Washington's legislature entrusted Ecology, not DEQ, with the responsibility and obligation to protect the State's water quality standards. Second, Oregon has a shallow-water criterion incorporated into its TDG water quality standard that protects aquatic organisms that cannot dive to depths to avoid harmful levels of gas. Third, in other litigation regarding the Columbia River, Oregon has affirmatively aligned itself with plaintiffs that, like NSIA, seek additional spill as an end unto itself. Washington and other Northwest states do not support that position. Finally, Oregon was able to remove its 115% standard using a truncated administrative process – unavailable to Washington – that required little administrative effort or cost. *See* AR 001917.10 (AMT Report explaining reasons why Ecology and DEQ reached different results, but affirming that both agencies agree on the "fundamental technical findings" in the Report).

The cost of and resources involved in the administrative process necessary to change the existing TDG rule should not be understated. Unlike Oregon, Ecology would be required to undertake a formal rulemaking process, including a cost-benefit analysis and review under the State Environmental Policy Act. AR 001704.2. Any rule revision proposed by Ecology is further required to be reviewed by EPA, and if approved, consulted on by NMFS under ESA section 7(a)(2). 33 U.S.C. §

1313(c); 16 U.S.C. § 1536(a)(2). This process would take years and consume tremendous agency resources.

Ecology expressly recognized these potential costs when it initially decided that a change to the rule was not justified. AR 001840.62-63 (evaluating the potential costs and benefits of weakening the TDG rule, including administrative and rulemaking costs, and concluding that a change was not warranted). Although, as explained above, these financial concerns were not the primary reason for denying the petition, they were clearly a consideration. Accordingly, this Court must be "sensitive to the special problems of priority setting and resource allocation" informing Ecology's petition denial, in light of the existing moratorium on non-essential rulemaking. *Hillis*, 131 Wn.2d at 394 (internal quotation marks and citation omitted).

C. Petitioners Are Not Entitled To An Order Compelling Rulemaking.

As established above, NSIA has completely failed to establish any entitlement to judicial relief in this case. Nonetheless, were this Court to theoretically determine that Ecology erred in not providing an adequate response to some aspect of NSIA's latest petition (and there is no reason to do so), the only remedy available under the APA would be to remand for reconsideration in light of that theoretical omission. RCW

34.05.574(1)(b); *Hillis*, 131 Wn.2d at 400 (court shall not itself undertake to exercise the discretion the legislature has placed in the agency and, if necessary, shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay).

In short, this is not the type of "extraordinary circumstance" that should lead this Court to compel rulemaking, especially given that the rulemaking is discretionary and current fiscal constraints have forced the State to impose a rulemaking moratorium. *See* Executive Order 10-06; *cf. Rios,* 145 Wn.2d at 507 (emphasizing that "[o]rdinarily, an agency is accorded wide discretion in deciding to forgo rulemaking in an area, and fiscal constraints may reasonably determine whether an agency takes action (and if so, how)").

V. CONCLUSION

For all of the reasons stated above, NSIA's appeal should be dismissed, and the judgment of the Superior Court affirmed.

DATED this 14 day of December 2011.

STOEL RIVES LLP

By _____
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the date indicated below the foregoing RESPONSE BRIEF OF NORTHWEST RIVERPARTNERS was caused to be served via Legal Messenger on the individuals and/or offices at the addresses listed below:

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I further certify that on December 14, 2011, I caused the original and one copy of the RESPONSE BRIEF OF NORTHWEST RIVERPARTNERS to be filed with the appellate court via legal messenger:

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DATED: December 14, 2011.

Lynn A. Stevens, Legal Secretary